

The Role of the Mental Health Professional in Option Development: A Case Study



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“The parties are responsible for the outcome.” That statement is written in the brief article “What is Collaborative Law” in the training manual I received in 2008. Sounds easy enough. But how do you get from the relatively easy phase of discussing goals and interests to really putting pen to paper and coming down with options that both of the clients (note the use of the term “clients” as opposed to “parties”)

will live with? “The parties are responsible for the outcome.” That statement is written in the brief article “What is Collaborative Law” in the training manual I received in 2008. Sounds easy enough. But how do you get from the relatively easy phase of discussing goals and interests to really putting pen to paper and coming down with options that both of the clients (note the use of the term “clients” as opposed to “parties”) will live with? This is an especially emotional phase for the clients, and it is fraught with potential outbursts and accusations if not handled carefully. Here is where the neutral mental health professional (MHP) must play his or her cards especially well.

Consider the following. Jane and Joe (not their real names) both share that they are “ready to get this over with” during the initial meeting with their attorneys. They truly do not see a need for a neutral MHP, but nonetheless agree to it after explanation. They breeze through the goals and interest phase and are ready to hunker down and do the work. The team works well together, and the clients have done a masterful though painstaking job gathering the needed information and presenting it to the team. They have met frequently with the neutral financial planner (FP) and both have a good understanding of what is what. They have met twice with the MHP to discuss very sensitive issues regarding the estate and seem to have come to some preliminary agreements (not legally binding, of course). All is well. As the option development meeting progresses, Joe casually wonders how he is going to move the piano out of the marital residence. Jane becomes unhinged. Voices are raised, tempers are ignited, and it appears as though everything is about to break down. What just happened?

The first thing to notice is the sentence “they breeze through the goals and interest phase.” Chapter 6 of “Protocols of Practice for Collaborative Family Lawyers”, section 6.02 reads, “The first and most important stage of the collaborative law process is defining the parties’ goals and interests.” The MHP cannot assume that once the goals and interests are on the whiteboard that it can be cast aside and put to rest. During this phase, it is crucial for the MHP to notice not just what one person is saying, but also what the other person is not saying. What are the unspoken reactions? Is that person bored, seething, shaking his/her head in disagreement? Is that person even paying attention? What about the person who historically has not fought for him/herself? Are they just “playing dead” or waving a white flag of surrender? It is during this phase, while defining goals and interests, that the team is laying the foundation for option development. It is then when the MHP takes note of reactions and deals with them, either head on or if needed, off-line and helps the clients get back on track.

For Jane, she had been a quiet mouse in their marriage. Joe was a very successful oil executive, and Jane was a volunteer at the local children’s hospital. Over the years, she had learned to be quiet and agreeable, and this worked for 20 years, until it didn’t. In the initial meeting, the team noticed that Jane would speak up but then quickly quiet down when Joe would interject something. The MHP took note and reminded them that each would be able to speak without interruption. Joe would apologize and Jane would say something to the effect of “it’s OK.” The MHP noted that when Joe said that he wanted the piano, Jane appeared to be shocked. When it was her turn to talk about her goals and interests, she said she was surprised that Joe wanted the piano since he didn’t play a note. Still, she did not express an interest to have it.

What the MHP should have done was either bring it up then and there or make a mental note of it and bring it up during an off-line meeting. Knowing that Jane had been a less than active participant in the marriage historically was the first clue that it would more than likely be that her goals and interests might come in fits and starts, or that she would need to be encouraged to speak up and find a voice. It takes some finesse to do so without losing one’s neutrality, but it can most certainly be done. In each and every subsequent meeting, the goals and interests should be reviewed and modified if need be. This would have been a good way to see the clients’ progression in the collaborative process.

The second thing to notice is that the MHP met off-line with the couple on two different occasions. This would have been an excellent time to bring up the piano and Jane’s comment about Joe not playing. A simple, “I’m curious, Joe, since you don’t play the piano and you expressed an interest to keep it, is it a family heirloom?” The tone is one of curiosity and not confrontational, and he has been given an “out” with the heirloom question.

It also would have been appropriate to tell Jane that it had not gone unnoticed that she seemed shocked when Joe said he was interested in the piano. Whether she played piano or not (she did) may have been irrelevant. What was not irrelevant was the fact that she too wanted it, and it was an item that got lost in the process, even though it was mentioned during the first meeting. Clearly, she did not put it on “her side” of the goals and interest list, but it was here that the MHP needed to pay close attention to not only what is being said, but sometimes most importantly, what is not said. And it would be important that the MHP keep the team up-to-speed on the off-line discussions about the piano (and other issues). That way, the attorneys would also be working with the clients to find equitable solutions.

Finally, it is perfectly acceptable to call a time-out during the option development phase, and in any phase for that matter. It is also acceptable, though not ideal, to end the meeting and regroup if need be. Obviously, this would only be done if the time-out were productive and the team decided that it was in the clients’ best interest to reconvene at a later time. It would be the MHP’s role to stop the process when Jane “became unhinged” and gently but firmly ask for a time-out. The time-out call should be swift and clear so that the meeting does not become contentious. At that point, it is advisable for the MHP to request a meeting with both clients and their attorneys separately, always in the interest of appearing neutral. Since it was Jane who erupted, it would be Jane and her attorney that the MHP would meet with first. If it were clear to everyone that this was not an issue that could be resolved (e.g. Jane is able to clearly articulate that she wants the piano and this is a non-negotiable for her, and Joe too sees it as a non-negotiable), the meeting should end and a date for a new meeting would be set, hopefully sooner rather than later.

So what is the role of the MHP during the development of settlement options? Below is a list of things to consider during this phase in the collaborative law process.

1. Always keep the goals and interests in mind and discuss them at the outset of every meeting.
2. Be prepared to deal with “hot button” issues. The MHP will know what those are based on prior meetings and how the clients reacted to various topics.
3. Prepare the professional team by letting them know what the hot button issues are. In this case, it would have been important for both attorneys to know that both clients wanted the piano and why. The attorneys could have talked to the clients about the pros and cons of keeping it and perhaps used it as a negotiation tool. Further, in understanding why, it may become clearer to the client that perhaps it is not as important to keep, and it may be more of an emotional issue than it is an item of interest. Again, staying neutral and out of the way is imperative. It is the clients who are responsible for outcome. It is the MHP’s role to help them get there collaboratively.
4. Understand that often, when one of the clients has been quiet and submissive during the marriage (most often the wife), the new-found voice can often have a distinctive edge to it that may lack moderation. It is crucial that the MHP offer gentle reminders of the code of conduct and help reframe what is trying to be said in a more agreeable tone. It has been my experience that the distinctive edge comes out full-bore during this phase.

5. During the option development phase, the reality of divorce sinks in. Emotions often come to the surface. The MHP must be aware of the need for clients to take a break (more often than not a 5-minute break will suffice) in order to regroup and get back into working out the settlement options. If there is ever a time to be aware of the clients' emotional state, it is now.

The team meeting ended abruptly that day, with Jane telling her attorney and the MHP that she would "go to court" if she did not get the piano. The attorneys worked with their clients during that week and were able to come